Supreme Court, U.S.
FILED

94 456 SEP 12 1994

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HAZEL W. BUNCE and THE BANK OF NEW YORK, EXECUTORS FOR THE ESTATE OF CHARLOTTE B. MAJOR,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SAMUEL M. MARUCA*
ROGER A. PIES
ZAPRUDER & ODELL
601 - 13th Street, N.W.
Washington, D.C. 20005
(202) 508-9600
Counsel for Petitioners.

*Counsel of Record

Washington, D.C. • THIEL PRESS • (202) 328-3296

55 pp

QUESTIONS PRESENTED

1. Whether the trial court erred by foreclosing discovery based on an erroneous legal standard, and entering summary judgment based on the correct (but different) legal standard, such that the taxpayer was denied access to facts essential to its claim under the correct legal standard.

2. Whether a fact-finder could reasonably conclude, based on undisputed facts in the record and reasonable inferences therefrom, that the taxpayer would have obtained a standard settlement of tax liability but for discriminatory treatment by the IRS.

PARTIES

This statement is submitted pursuant to Rule 29.1 of the Court. The Bank of New York is a corporation acting solely in its fiduciary capacity as Executor of the Estate of Charlotte B. Major, and has no interest in the outcome of this petition.

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HAZEL W. BUNCE and THE BANK OF NEW YORK, EXECUTORS FOR THE ESTATE OF CHARLOTTE B. MAJOR,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Hazel W. Bunce and the Bank of New York, Executors for the Estate of Charlotte B. Major, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit, issued without opinion, is reported at 26 F.3d 138, and appears as Appendix A to this Petition.

The Opinion and Order of the United States Court of Federal Claims granting summary judgment for the United States is reported at 28 Fed. Cl. 500, and appears as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1994. On June 13, 1994, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* (Appendix C). Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure. A copy of Rule 56 appears as Appendix D to this Petition.

STATEMENT OF THE CASE

The circumstances of this case are, one would hope, highly unusual. There is undisputed evidence of gross misconduct by an IRS appeals officer. Other established facts suggest that, but for this conduct, the taxpayer would have achieved settlement of its estate tax liability on terms routinely granted to others in the same position. The trial court approved the legal basis for the taxpayer's claim, yet, at the behest of the United States, denied any meaningful opportunity to discover the

necessary facts. Petitioners ask that this Court exercise its inherent supervisory powers to confer the process that is rightfully due.

Charlotte B. Major died in 1984 holding public housing bonds (so-called "*Haffner* bonds"). Her executors, Petitioners herein, excluded the value of the bonds from her gross estate for Federal estate tax purposes. The Internal Revenue Service (the "IRS") determined, after audit, that the full value of the Estate's Haffner bonds was includible in the gross estate.

At the time, the proper tax treatment of Haffner bonds was unsettled. The IRS, starting in June 1986, settled many Haffner bond cases at the administrative level based on a pattern settlement reflecting the hazards of litigation.[1] On February 27, 1987, representatives of the Estate attended a settlement conference with Appeals Officer Leonard Hershkowitz. Hershkowitz offered the pattern settlement on a "take it or leave it" basis. The Estate's representatives orally agreed to accept the settlement.

Upon the conclusion of substantive settlement discussions, Hershkowitz told the Estate's representatives that he had a daughter in law school who was seeking employment. He inquired whether there was any possibility that the Estate's representatives, the law firm of Milbank, Tweed, Hadley & McCloy, might offer her a position. One of the Milbank lawyers said he would "be glad to forward [Hershkowitz's] daughter's resume

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[1] An informal survey by the IRS dated March 10, 1987, found that the "New York City Appeals is offering a settlement of 60% in the government's favor. So far, 90% of the taxpayers have agreed to the settlement."

to [the firm's hiring] committee," and later received and forwarded the resume as requested by Hershkowitz.

During the next few days, representatives of the Estate, in consultation with the IRS, calculated the amount of Federal estate tax due by including 60 percent of the value of the Estate's Haffner bonds in the gross estate. The IRS filled in the amount due, and other data required by the settlement document (Form 890-AD), and the Estate's representatives picked up the Form on or about March 3, 1987. On March 6, 1987, the Estate's representatives delivered to the IRS the completed Form 890-AD, signed and dated by the executors. Attached to the Form 890-AD was a check in full payment of the amount due under the settlement. The IRS negotiated the check on March 9, 1987.

During the months of March, April, and May, 1987, the Estate's representatives made several telephone inquiries to Hershkowitz about the IRS's progress in closing out the Estate. Hershkowitz's responses did not indicate that there was any problem. Hershkowitz later confessed, however, that he pulled the Form 890-AD from the administrative file and destroyed it. Hershkowitz's actions violated the IRS's procedures which require that the Form be returned to the Estate. For reasons explained below, Hershkowitz's purpose in destroying the Form 890-AD remains unknown.

In late April or early May, 1987, the IRS National Office issued a memorandum, dated April 28, 1987, instructing all regional appeals offices to stop settling Haffner bond cases. The memorandum was received in the New York City Appeals Office on May 6, 1987. Nearly one month later, on June 2, 1987, Hershkowitz telephoned the Estate's representatives and stated that

the IRS would no longer concede any portion of the Haffner bond issue.

On April 24, 1987, the Heydon estate, which also held Haffner bonds, submitted a Form 890-AD to the New York City Appeals Office. This Form 890-AD, like the Estate's, reflected the IRS's pattern settlement. The Heydon estate's offer was accepted by the IRS on May 11, 1987, exactly 17 days after submission of the Form 890-AD.[2] The IRS approved the Heydon estate's offer after the IRS National Office Memorandum instructed IRS Appeals Offices to stop settling Haffner bond cases.

On June 30, 1987, the Estate paid the additional taxes and interest resulting from inclusion of the remaining 40 percent of the value of the Haffner bonds in the gross estate, and filed a claim for refund. The IRS denied the Estate's refund claim on June 25, 1990. On June 12, 1992, the Estate timely filed suit in the Court of Federal Claims seeking a refund of the taxes paid in June, 1987, plus interest. The basis for jurisdiction was 28 U.S.C. §1491.

In its Complaint, the Estate alleged, *inter alia,* that the IRS abused its settlement discretion and, therefore, was compelled to settle with the Estate in accordance

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[2]The 17 days required for approval of the Heydon estate's offer may or may not have been typical. Although there were certainly many other such Haffner settlements, the Estate was blocked from obtaining any evidence of the time period required to process other settlements. The Estate was able to obtain information with respect to the Heydon estate only because the Bank of New York, an executor of the Estate, also served as an executor of the Heydon estate. The United States refused to answer discovery requests regarding the disposition of other Haffner bond cases.

with the terms of the Form 890-AD. The Estate's theory was that Hershkowitz deliberately delayed processing the Estate's Form 890-AD in an attempt to put pressure on the Estate's representatives to offer employment for his daughter. As a result, the Estate was deprived of the IRS's standard settlement, which it would have obtained had the Form 890-AD been processed in the normal course.

The United States contended that, as a matter of law, the Estate could not recover without producing a properly executed Form 890-AD. The United States deemed Hershkowitz's misconduct immaterial. The United States argued that the only material fact in the litigation was whether the Form 890-AD was ever executed by an authorized official. On this basis, the IRS steadfastly resisted the Estate's efforts to determine what Hershkowitz did in the Estate's case and what the IRS did in other Haffner cases in the IRS's New York Appeals Office.

On December 7, 1992, just three months after it answered the Complaint, the United States moved for summary judgment. In its motion for summary judgment, the United States asserted that: (1) Section 7122 of the Internal Revenue Code (26 U.S.C. §7122) provides the exclusive means for compromising tax cases, and (2) the undisputed facts demonstrated that the requirements for a compromise had not been met, *i.e.*, there was no signed agreement. The United States further argued that the Estate "commits serious errors by focusing attention on the words and actions of IRS Appeals Officer Leonard Hershkowitz" and asserted that the allegations described above against Hershkowitz "are not relevant to this action." At no point did the United

States challenge the sordid facts in the record relating to Hershkowitz's conduct.

In conjunction with its summary judgment motion the United States moved to suspend any further discovery. In support of its motion the United States contended that "after reviewing [the United States' summary judgment] motion, the [Estate] will realize that it does not require any additional discovery or that such discovery would be fruitless." Based on this contention, and over the objection of the Estate, the trial court granted the motion and cut off discovery.

The trial court did permit the parties to conduct informal discovery, as they might agree. The United States grudgingly allowed the Estate to depose Benjamin Brancato, Hershkowitz's direct supervisor. The United States, however, provided no assistance in locating Mr. Hershkowitz who had, by this time, retired from the IRS Appeals Office. Petitioners could not locate Hershkowitz despite diligent searches of the public records and efforts to trace him through an (apparently incorrect) telephone number provided by the attorney for the United States during Brancato's deposition.

The Brancato deposition proved fruitless for the Petitioners because counsel for the United States refused to permit Brancato to testify about IRS settlement policy, or any other matter not specifically relating to the Estate's case as viewed by the United States.[3] Further, Brancato had no first-hand knowledge of the Estate's settlement offers. He stated that he had first heard of the Estate's case on July 27, 1987, long after Hersh-

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[3] On 22 occasions during the deposition, counsel for the United States instructed Brancato not to answer questions about the settlement of Haffner cases by the New York Appeals Office.

kowitz apparently destroyed the Form 890-AD.[4] Thus, Brancato had no personal knowledge of any of the events relating to the settlement discussions with Hershkowitz, the destruction of the Estate's Form 890-AD, or the apparent delay in processing the settlement, and could testify only that he had not executed the Form. Consequently, Brancato's testimony, although material under the United States' theory of the case (no signed Form 890-AD), and ultimately relied upon by the trial court, was useless to the Estate in its effort to support its discrimination claim.

On February 10, 1993, the Estate filed its brief in opposition to the United States' motion for summary judgment. In its brief, the Estate contended, *inter alia,* that Hershkowitz's conduct deprived the Estate of the pattern settlement. The Estate asked the trial court to suspend summary judgment proceedings to allow for continued investigation of the circumstances surrounding the IRS's denial of the settlement. The Estate's trial attorney timely filed a Rule 56(g) affidavit (Appendix E) showing that the Estate needed further discovery into the procedures followed by the IRS in processing the Estate's settlement and, in particular, discovery from Hershkowitz.

On June 10, 1993, the trial court entered judgment in favor of the United States. Significantly, however, the trial court rejected the United States' theory that a properly executed Form 890-AD was the only basis for recovery. Instead, the trial court accepted the Estate's contention that it could recover, even in the absence of a duly executed Form 890-AD, by showing that the IRS

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[4]This statement is inconsistent with an earlier statement by Hershkowitz to Brancato, in writing but unsworn, that he (Hershkowitz) had previously discussed the Form 890-AD with Brancato.

abused its settlement discretion. The trial court applied the following legal standard:

> to prevail on its abuse of settlement discretion claims, the plaintiffs must show both 1) that other similarly situated taxpayers have received more favorable settlements *and* 2) that the IRS intentionally singled out plaintiffs for arbitrary or irrational reasons.[5]

Appendix B at 21a. This test, which focuses on the intent of the IRS, put the trial court in an obvious quandary, since the primary actor, Hershkowitz, had not been heard from. Rather than revisiting its decision to cut off discovery, however, the trial court relied upon Brancato's deposition to find that the IRS's New York City Appeals Office "followed its usual neutral procedures" in the Estate's case, notwithstanding that Brancato first learned of the Estate's case almost five months *after* the Estate submitted its Form 890-AD. By looking to Brancato's deposition, the trial court confirmed that inquiry into the settlement process was proper, yet then relied exclusively upon the testimony of a person with no personal knowledge of the critical facts. The court noted that while there was something "intuitively troubling" about the disparate treatment of the Heydon estate, there was "no need to deny summary judgment or allow additional discovery in order for plaintiffs to investigate how their own lawyers were influenced."[6] The trial court concluded

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[5]The trial court observed that "no appellate court has ruled on the matter and this appears to be the Court of Federal Claims' first settlement discretion case . . .". Appendix B at 18a.

[6]The trial court misconceived the Estate's claim. The Estate did not assert that Hershkowitz succeeded in influencing its lawyers, but rather that Hershkowitz intentionally delayed processing the Form 890-AD in a *failed* attempt to obtain a job for his daugh-

[footnote continued]

that Petitioners had not "substantiated their charge of improper influence with even a shred of evidence."

THE FEDERAL CIRCUIT DECISION

On appeal, the Federal Circuit affirmed *per curiam*, citing Rule 36 of the Federal Rules of Appellate Procedure, which permits affirmance without opinion when "an opinion would have no precedential value." Apparently, the Federal Circuit concluded that no novel legal issue was presented, notwithstanding the trial court's observation that the scope of settlement discretion had never been addressed by the Court of Federal Claims or by any appellate court.

REASONS FOR GRANTING THE PETITION

The decision of the Federal Circuit lets stand a ruling that departs radically from the accepted and usual course of summary judgment proceedings. As a result, the Estate has been denied its right to be heard on a legitimate claim of injury by IRS misconduct.

The rulings below deprived the Estate of the "full opportunity to conduct discovery" mandated by this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (hereinafter "*Anderson*"), and *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986) (hereinafter "*Celotex*"). Unless this Court exercises its power of supervision, the Estate will have had no meaningful opportunity to obtain facts that, if proven, would entitle it to judgment.

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ter. If the Estate were able to demonstrate that its settlement offer would have been approved but for Hershkowitz's improper conduct, it would prevail in this action.

Moreover, the lower court rulings conflict with this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (hereinafter "*Adickes*"), in which this Court held that evidence of significantly lesser quality than in this case nevertheless was enough to mandate trial of the plaintiff's discrimination claim. The analysis applied by the lower court requires that the Estate produce "smoking gun" evidence to withstand summary judgment. Neither *Anderson* nor *Celotex* requires that the nonmoving party conclusively prove its case at the pretrial stage. The Court should reaffirm the essential protection afforded to a party opposing summary judgment, *i.e.*, entitlement to a favorable construction of the facts and all reasonable inferences in its favor.

ARGUMENT

I.

THE DENIAL OF MEANINGFUL DISCOVERY REQUIRED BY *ANDERSON* AND *CELOTEX* MANDATES A FINDING THAT THE TRIAL COURT ABUSED ITS DISCRETION.

In *Anderson*, the Court equated the standard for awarding summary judgment under Rule 56 with the directed verdict standard under Rule 50(a). When, as in this case, the nonmoving party bears the burden of proof, summary judgment may be entered unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. The trial court must consider the "actual quantum and quality of proof" that must be adduced in order for the nonmoving party to satisfy its burden of proof. *Id.*

The Court in both *Anderson* and *Celotex* clearly encouraged wider use of the summary judgment mechanism to prevent unnecessary trials, but the Court did not

sanction the result reached here. The heightened evidentiary burden imposed on nonmoving parties under *Anderson* and *Celotex* only underscores the importance of assuring sufficient access to proof, long a fundamental requirement in summary judgment proceedings. Thus, *Anderson* makes clear that a trial court may enter summary judgment only if the nonmoving party has had a full opportunity to discover material evidence. 477 U.S. at 257 (nonmoving party must present affirmative evidence, even if evidence is in moving party's control, provided nonmoving party "has had a full opportunity to conduct discovery"); *see also Celotex*, 477 U.S. at 326 (nonmoving party must have "opportunity to make full discovery"). The decision whether sufficient discovery has been allowed rests in the sound discretion of the trial judge.

In this case, the trial court was misled by the United States's assertion that the Estate could recover only by producing a signed settlement agreement. As a result, it cut off formal discovery at the very time the Estate was seeking facts to support its discrimination claim. In his Rule 56(g) affidavit, counsel for the Estate pointed out that Mr. Brancato had no personal knowledge of events during the period February through June, 1987, and that the Estate needed further documentation and testimony from personnel who did have personal knowledge. Further, the affidavit noted that the Estate had not succeeded in locating Mr. Hershkowitz, whose conduct was directly at issue and who had to be deposed. The Estate's pending discovery requests thus sought information directly related to the processing of the Estate's settlement papers and the settlements of other Haffner bond cases. Those requests were never answered.

In two cases involving virtually identical facts, the Federal Circuit held that the trial court abused its discretion in cutting off discovery and awarding summary judgment to the United States. In *Burnside-Ott Aviation Training Center, Inc. v. United States,* 985 F.2d 1574 (Fed. Cir. 1993), the company relied upon equitable estoppel and mutual mistake in seeking adjustment under a government contract. The trial court determined, incorrectly, that the claims were barred as a matter of law, and cut off discovery on that basis. Reversing, the Federal Circuit stated that

> We note that the trial judge exercised commendable trial management in trying to eliminate unnecessary discovery. And based on his view of the law, broader discovery was indeed unnecessary. Having determined, however, that neither the equitable estoppel claim nor the mutual mistake claim is barred as a matter of law, further discovery must be allowed.

985 F.2d at 1582.

Similarly, in *Connell Rice & Sugar v. United States,* 837 F.2d 1068 (Fed. Cir. 1988), the plaintiff failed to perform under a government contract. On the theory that the plaintiff's obligations under the contract were absolute, the United States obtained a protective order precluding discovery relating to possible contributory fault by the government. The Federal Circuit ultimately determined that the contractor's obligations were not absolute, and that entry of summary judgment accordingly was in error. The court remanded the case to permit discovery based upon the proper legal standard. *See also Long Island Lighting Co. v. Barbash,* 779 F.2d 793, 795 (2d Cir. 1985) ("[g]rants of summary judgment on an incomplete record are generally disfavored, and this

is particularly true where we conclude that the district court's discretion over the fact-finding process has been tainted by an erroneous view of the law").

A discovery cut-off on one theory, coupled with the entry of summary judgment on another, puts the nonmoving party in an intenable position. As Judge Rader himself observed during oral argument before the Federal Circuit, the trial court's ruling is a "catch 22." That the Estate may recover on a showing of intentional discrimination is cruel irony when the trial court's own protective order foreclosed discovery of the material facts. Before summary judgment can be imposed, the Estate must be given the opportunity to obtain the facts that prove its claim.

II.
UNDER *ADICKES*, THE RECORD FACTS CREATE A GENUINE ISSUE FOR TRIAL.

The Court in *Anderson* did not specify the "quantum and quality" of proof required of the nonmoving party. The Court's analysis, however, makes clear that in the context of discrimination claims direct evidence is unnecessary. In *Anderson*, the Court discussed at length, and specifically confirmed, its prior holding in *Adickes*, a case involving the exact issue presented here. In *Adickes*, as in this case, the question was whether the record contained sufficient evidence of discrimination to mandate trial. Petitioners submit that, even without the additional discovery to which the Estate was entitled, the Estate adduced enough evidence to withstand summary judgment under *Adickes*.

In *Adickes*, the Supreme Court reversed a summary judgment verdict in favor of a defendant in a civil rights case. The plaintiff alleged that the defendant conspired

with police to refuse her service and arrest her for vagrancy when she left defendant's restaurant. The defendant submitted affidavits from employees and the police department denying any communication or agreement. For her part, plaintiff had only the Complaint, her deposition statement, and an unsworn statement by one of defendant's employees to the effect that the arresting officer had been in the restaurant. The Court held that summary judgment was not appropriate, since "it would be open to a jury . . . to infer from the circumstances that the policeman and [defendant's] employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U.S. at 158.

Just as in *Adickes,* in this case a fact-finder could reasonably have inferred from the evidence that Hershkowitz deliberately delayed processing the Estate's settlement papers. The issue is not whether the evidence *necessarily* leads to this conclusion; it is whether a fact-finder could reasonably infer the improper conduct. As the Third Circuit noted in *Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893 (3d Cir. 1987), a case arising under the Age Discrimination in Employment Act, "age discrimination, like other forms of discrimination, is often subtle." 814 F.2d at 899. Rarely does the plaintiff find a "smoking gun."[7]

The trial court apparently did not ask whether the Estate had adduced enough evidence to support a verdict on the discrimination claim. In essence, all the trial court did was conclude, based on the testimony of a man with no personal knowledge of the material facts, that the IRS

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[7] In granting summary judgment, the trial court relied on the fact that, after the initial request, Mr. Hershkowitz never contacted the Milbank lawyers about his daughter. App. B at 16a.

"followed its usual neutral procedures." Seeming to disregard all inferences in favor of the Estate, the trial court further concluded that not a "shred" of evidence supported the Estate's claim that it was invidiously singled out. Yet the trial court had before it undisputed evidence showing solicitation of favors by the cognizant IRS officer, coupled with much faster (and more favorable) processing of the only other case Petitioners were able to investigate.[8] Certainly there is more than enough circumstantial evidence to conclude that, but for Hershkowitz's wrongful conduct, the Estate would have obtained the same settlement obtained by the Heydon estate in just 17 days.

In reaching its conclusion, the trial court appears to have misconceived the effect of the *Anderson* decision. The Court in *Anderson* did not say that the nonmoving party must conclusively prove its case to avoid summary judgment, a notion of dubious constitutional validity. Rather, all *Anderson* asks is whether a reasonable fact-finder, construing the evidence in the light most favorable to the opposing party, could find for that party. That standard is met here even more clearly than in *Adickes.*

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[8] In *Commissioner v. Lester*, 363 U.S. 299, 306 (1961), Justice Douglas turned around an earlier quote from Justice Holmes by observing that: . . . . "I think the Government in moving against the citizen should also turn square corners." The evidence and inferences therefrom make it appear extremely doubtful that such a square-cornered process was followed by Mr. Hershkowitz.

CONCLUSION

There is undisputed evidence of Government misconduct in this case. Whether the Estate is entitled to the pattern Haffner settlement remains to be determined after discovery is complete. The Estate would prevail if the evidence shows that Mr. Hershkowitz delayed processing the settlement for an improper purpose and that, as a result, the Estate suffered injury.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court expressed its approval of a fundamental precept, inscribed on the Rotunda at the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts." In this case, justice demands a remand for completion of discovery and for trial.

A Writ of Certiorari should be granted to review the decision below, so that this litigant may have its day in court.

Respectfully submitted,

SAMUEL M. MARUCA*
ROGER A. PIES
ZAPRUDER & ODELL
601 - 13th Street, N.W.
Washington, D.C. 20005
(202) 508-9600
Counsel for Petitioners.

*Counsel of Record

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
For The Federal Circuit

93-5178

HAZEL W. BUNCE and THE BANK OF NEW YORK, Executors for the Estate of CHARLOTTE B. MAJOR,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S). 92-399T

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam: (RICH, *Circuit Judge,* SKELTON, *Senior Circuit Judge,* and RADER, *Circuit Judge*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED APR 8 1994 /s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: June 20, 1994
[Filed APR 8, 1994]

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

June 9, 1993

No. 92-399 T

HAZEL W. BUNCE and THE BANK OF NEW YORK, executors for the Estate of Charlotte B. Major,

Plaintiffs,

versus

UNITED STATES OF AMERICA,

Defendant.

Estate tax refund suit; "Haffner" bonds"; authority of IRS to compromise tax cases; acceptance of tax compromise offers; equitable estoppel in tax cases; abuse of administrative discretion in compromising tax cases; Treas. Reg. (26 C.F.R.) §301.7122-1 (1967).

David H. Dickieson, Washington, D.C. for plaintiffs.

Robert J. Higgins, with whom were Acting Assistant Attorney General James A. Bruton, Mildred L. Seidman, and David Gustafson, Washington, D.C., for defendant.

OPINION and ORDER

TURNER, Judge.

This opinion addresses defendant's motion for summary judgment filed December 9, 1992. We conclude that defendant's motion should be granted.

I

A

The material facts are undisputed, though each party interprets them differently. The facts as given here diverge in no important way from the plaintiffs' recitation. Pl. Br. at 4-10.

Charlotte B. Major died in 1984 holding public housing bonds. Her executors, plaintiffs herein, excluded these bonds from their calculation of her taxable estate based on *Haffner v. United States*, 585 F.Supp. 354 (N.D. Ill. 1984), *aff'd*, 757 F.2d 920 (7th Cir. 1985), the first case to hold that public housing bonds were not taxable at death. The IRS upon audit included the full value of Major's so-called Haffner bonds.

The *Haffner* doctrine, never followed by any other court, was overruled by the Supreme Court in 1988. *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988). Before *Wells Fargo* definitively reestablished the taxability of Haffner bonds, the IRS, starting in June 1986, compromised many Haffner bond cases. The New York City Appeals Office, which handled the Major estate, settled 90 percent of its Haffner bond cases by including only 60 percent of the bond value in the taxable estate. Pl. Appendix, Ex. 10. The settlement practice in other regions varied, with some regions settling no Haffner bond cases. *Id.* The widespread compromise of Haffner bond cases came to an end at the latest on April 28, 1987 when the national office of the IRS Appeals Division issued a memorandum instructing all regional appeals offices to stop the settlements. Pl. Appendix, Ex. 9. There is evidence that oral instructions to the same effect were received in the New York City Appeals Office some

time earlier. Pl. Appendix, Ex. D at 40-41 (Aff. of Brancato).

Well before the Appeals Division issued instructions to end Haffner bond settlements, a February 27, 1987 discussion between the parties to this litigation resulted in an oral agreement to compromise the Major estate's Haffner bond issue on the New York City office's typical terms, including only 60 percent of the bond value in the taxed estate.[1] During the next few days, representatives of the estate, in consultation with the IRS, calculated the amount due under a 60 percent inclusion. The IRS then provided the plaintiffs with an IRS Form 890-AD, the form for memorializing estate tax compromises. The IRS had filled in the amount due on the Form 890-AD prior to giving it to plaintiffs, but the form was not signed by any IRS official. On March 6, 1987, the executors delivered to the IRS the signed, dated compromise offer ready for signing by the IRS. Attached to the Form 890-AD was a check in full payment of the compromise; this check was cashed on March 9, 1987. The Form 890-AD was never returned to the executors; instead, it was destroyed.

At the same February 27 meeting, IRS Appeals Officer Leonard Hershkowitz told the estate representatives, who were attorneys with a large NewYork law firm, that he had a daughter in law school seeking employment. One of the lawyers said he would "be glad to forward [the daughter's] resume to [the firm's hiring] committee" and later did so. Pl. Appendix, Ex. B (Aff. of Blattmachr). There was no further communication between

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[1] The estate's course of negotiation with the IRS during this period has been attested to by one of the estate's lawyers. Pl. Appendix, Ex. A. (Aff. of Feigert).

the parties on this matter; the Appeals Officer's daughter was not hired by the firm. *Id.* A different law firm represents plaintiffs in this case.

Between March and May, estate representatives made several telephone inquiries of Hershkowitz about the IRS's progress in closing out the Major estate and returning the executed Form 890-AD; during one of these conversations, Hershkowitz said that the closing letter was "in the mail." Pl. Appendix, Ex. A (Aff. of Feigert).

On June 2, 1987, Hershkowitz telephoned estate representatives with news of the April 28, 1987 IRS memorandum ordering an end to Haffner settlements. Hershkowitz informed them that the estate's Haffner bonds were fully taxable.

The estate subsequently paid the taxes and interest resulting from inclusion of the remaining 40 percent of Haffner bond value, and then filed a claim for refund of the entire estate tax attributable to the Haffner bonds. Def. Appendix B at 5-9. The IRS denied the refund claim on June 25, 1990. Def. Appendix B at 46.

On April 26, 1987, the estate of another taxpayer holding Haffner bonds submitted its Form 890-AD compromise offer, also to the New York City Appeals Office. Pl. Appendix, Ex. C (Aff. of Vezutto). This offer, like plaintiffs', provided for the inclusion of 60 percent of the Haffner bond value in the taxable estate. The offer was accepted by the IRS on May 11, 1987, two weeks after the nationally circulated memorandum purporting to end all Haffner bond compromises. Plaintiffs now claim a tax refund based on the same 60 percent inclusion deal arranged by this other taxpayer, a deal identical to the one plaintiffs had orally struck with the IRS on February 27, 1987.

B

Plaintiffs have asserted five counts in their complaint. However, for the purposes of analysis the five counts can be grouped into three somewhat overlapping categories.

Counts I and III compose the first category. While Count I is titled "Breach of Settlement Agreement" (Cplt. at 12) and Count III is titled "Breach of Contract" (Cplt. at 13), the essence of each is the assertion that the facts show there was a binding compromise. Thus, they will be discussed together.

In Count II, plaintiffs assert that "[b]ecause Plaintiff reasonably relied, to its detriment, on statements made and actions taken by the IRS . . . [d]efendant is estopped from denying that the Form 890-AD was signed" and accepted in accordance with the relevant Treasury regulations. Cplt. at 13. This estoppel claim constitutes a second category.

Counts IV and V of the complaint make up the third category. Both counts essentially maintain that plaintiffs were improperly discriminated against by the IRS. Plaintiffs' Count IV, titled "Administrative Inconsistency and Discriminatory Treatment" (Cplt. at 14), asserts that the Major estate was treated differently from similarly situated estates because an IRS employee blocked the compromise in an attempt to coerce plaintiffs' lawyers to give his daughter a job. Count V, titled "Abuse of Administrative Discretion" (Cplt. at 17), asserts that IRS delay in processing the compromise offer, together with 1) IRS representations that the estate was about to be "closed out" and that the closing letter had been mailed and with 2) the fact that even after plaintiffs' settlement offer was refused the IRS compromised on identical terms with a similarly situated taxpayer, constitutes an abuse of administrative discretion. Cplt. at 18, ¶58. While Count

IV focuses on the alleged coercion of plaintiffs' lawyers by the IRS and Count V focuses on other IRS misbehavior, both essentially maintain that plaintiffs were improperly discriminated against, and they will therefore be discussed together.

II

In Counts I and III of the complaint (Cplt. at 12, 13), plaintiffs maintain that a binding compromise or contract arose from the facts described above. We disagree. Even if we assume, as plaintiffs invite us to, that an IRS employee with the authority to compromise cases such as this one signed the Form 890-AD and that the form was then destroyed to keep this fact from plaintiffs, there was no binding agreement. When we accept plaintiffs' facts and inferences as true, there remains no doubt that defendant is entitled to summary judgment on Counts I and III as a matter of law.

A

The IRS is not bound by any agreement which does not comply exactly with compromise procedures provided by statute and regulation. *Botany Worsted Mills v. United States*, 278 U.S. 282, 288-89 (1929). The regulation promulgated under the statute granting compromise authority to the IRS provides that "[o]ffers in compromise shall be submitted on forms [like the Form 890-AD] prescribed by the Internal Revenue Service . . . ." Treas. Reg. (26 C.F.R.) § 301.7122-1(d) (1)) (1967) [hereafter Section (d) (1)). Form 890-AD itself provides that "[t]his offer is subject to acceptance by or on behalf of the Commissioner . . . . It will take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted it will have no effect." Def. Appendix B at

31 (Form 890-AD). Acceptance is defined in the regulation: "An offer in compromise shall be considered accepted *only when the proponent thereof is so notified in writing.*" Treas. Reg. (26. C.F.R.) § 301.7122-1(d) (3) (1967) (hereafter Section (d) (3)) (emphasis added).

Therefore, in an estate tax case, once an offer in compromise has been submitted to the IRS on Form 890-AD, the offer is accepted when the IRS so notifies the taxpayer in writing. Here, it is undisputed that plaintiff was never notified in writing that its offer had been accepted. Plaintiffs' dark speculations on whether the destroyed form was signed are immaterial because the acceptance would have been effective not upon signing, but rather upon delivery to the taxpayer, which never occurred.

B

In arguing that a binding compromise was created in this case, plaintiffs alternatively contend that the circumstances indicate that the IRS, rather than the estate, was the Section (d) (3) proponent of this compromise offer. Under this analysis, the IRS made an oral offer to plaintiffs to compromise the case by including only 60 percent of the Haffner bond value; the IRS offer was then formalized when the IRS provided plaintiffs with a Form 890-AD with the amount due filled in; and the estate then duly gave the IRS written notification of acceptance, as required by Section (d) (3), when it submitted the Form 890-AD. As a legal matter, this theory cannot prevail. The United States cannot be the proponent of a compromise offer in the context of Treas. Reg. (26 C.F.R.) § 301-7122-1 (1967).[2]

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[2]This can be inferred from the text of the regulation, which states that offers "should generally be accompanied by a remittance . . . . " Section (d) (1). In a deal compromising tax liability, the IRS would never be paying the taxpayer. This indicates that

[footnote continued]

When plaintiffs' facts are accepted, defendants are entitled to judgment as a matter of law on Counts I and III, since the IRS never accepted the compromise offer. There is no genuine issue on the point of whether a binding compromise was ever reached.

III

Plaintiffs' claim in Count II that the government is estopped from denying the existence of a binding compromise is misconceived. Cplt. at 13; Pl. Br. at 2 n.1. Plaintiffs have failed to show the existence of a genuine issue as to whether they relied to their detriment on government misrepresentation. As will be discussed below, such detrimental reliance is necessary to any estoppel claim. Likewise, the plaintiffs' allegations fail to demonstrate the potential to show the extreme circumstances necessary to prove estoppel against the government. Analysis demonstrates that even accepting plaintiffs' factual contentions as true and drawing inferences therefrom

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the offeror or proponent of the compromise is always a private party. This conclusion is reinforced by Treas. Reg. (26 C.F.R.) § 301-7122-1(d) (4) (1967) which provides that "[i]f an offer . . . is . . . rejected, the amount tendered with the offer . . . shall be refunded [i.e. to the payer of the tax] . . . unless the taypayer . . . agreed that the amount tendered may be applied to the liability . . . ." These portions of the regulation make clear that the offeror, or proponent, is usually the taxpayer. The word "proponent" is used in Section (d) (3) instead of "taxpayer" not because the IRS can be the proponent, but because another private party such as an assignee may want to settle a taxpayer's liability. *Ralston Steel Corp. v. United States*, 169 Ct. Cl. 119, 128-29, 340 F.2d 663, 669, *cert. denied*, 381 U.S. 950 (1965) (dictum).

Under the compromise procedure provided for by Section (d) (3), the private party proponent of the settlement submits the Form 890-AD to the IRS. The IRS then must decide whether to accept the proponent's offer. This procedure cannot be deviated from. *Botany Worsted Mills*, 278 U.S. at 288-89.

generous to plaintiffs, no genuine issue exists, and it is plain that defendant is entitled to summary judgment as a matter of law on Count II.

A

The Supreme Court in 1990 appeared to lay down a clean rule that citizens seeking cash from the government could not win by estoppel: "claims for estoppel cannot be entertained where public money is at stake . . . ." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 427 (1990) (hereafter *Richmond*). However, the Federal Circuit recently determined that *Richmond* did not make such a broad ruling and that the conclusion that *Richmond* "stands for the proposition that equitable estoppel will not lie against the government for any monetary claim" is erroneous. *Burnside-Ott Aviation Training Center, Inc. v. U.S.*, 985 F.2d 1574, 1581 (Fed. Cir. 1993). *Burnside-Ott* is based on the concept that some rights to payment of money from the Treasury are "not based upon a statutory entitlement." *Id.* For instance in *Burnside-Ott*, the plaintiff's claim was said to be based on a contractual entitlement, not a statutory entitlement. Under the Federal Circuit's reading, the holding in *Richmond* bars only estoppel claims seeking payment " 'contrary to a *statutory* appropriation.' " *Id.*, (quoting *Richmond* at 424) (emphasis partially deleted). We follow the *Burnside-Ott* precedent and therefore must inquire whether in this case there is a genuine issue as to the existence of an estoppel claim. We find there is not.

B

Here, plaintiffs' allegations do not satisfy all the elements of an estoppel.[3] One requisite of a successful estoppel claim is that the party seeking estoppel protection have reasonably relied to its detriment on the adversary's conduct. *Lyng v. Payne*, 476 U.S. 926, 935-36 (1986); *Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 59, 61-63 (1984). In this case, plaintiffs make only a vague claim that the Form 890-AD was signed "in reliance," without alleging a specific detriment. Cplt. ¶ 13.

Having to pay taxes which are legally assessed does not constitute the type of detrimental reliance necessary to invoke estoppel. *Boulez v. Commissioner*, 76 T.C. 209, 215 (1981) (stating that "[t]he mere fact that petitioner . . . paid taxes . . . which he might otherwise have not . . . is not . . . a sufficient detriment to warrant . . . estoppel"), *aff'd on other grounds*, 810 F.2d 209 (D.C. Cir.), *cert. denied*, 484 U.S. 896 (1987). The reliance in a successful estoppel typically has caused the claimant to lose a legal right. *Heckler*, 467 U.S. at 61-62. In the tax area, this usually means that false information has led the estoppel claimant to allow a statute of limitations to run. *Stair v. United States*, 516 F.2d 560, 564 (2d. Cir. 1975) (estopping taxpayer); *Miller v. United States*, 500 F.2d 1007 (2d. Cir. 1974) (estopping IRS); *Vestal v. Commissioner*, 152 F.2d 132, 136-37 (D.C. Cir. 1945) (estopping IRS). The only legal right taxpayers give up when they sign a Form 890-AD compromise is the right to sue in the Tax Court.[4] Plaintiffs' generalized claim of detrimental

[3] For a full discussion of the elements of estoppel against the government, see *Clifton Peters v. United States*, No. 92-479, slip op. at 12-16 (Fed. Cl. April 27, 1993).

[4] "I understand that by my signing this form, the estate will not be able to petition the United States Tax Court, unless addi-

[footnote continued]

reliance thus must be premised on the release of their right to sue in the Tax Court.

But the only time plaintiffs might reasonably have considered themselves bound by the Form 890-AD terms was between their March 6 submittal of the Form 890-AD and the IRS's June 2 telephone call informing the plaintiffs that their offer would not be accepted. Since no filing deadline ran during this period, the plaintiffs' factual contentions fail to show any potential detriment of the type necessary for a successful estoppel claim.[5]

C

Plaintiffs claim that IRS misconduct in this case was so gross as to estop the government from denying that a binding agreement was reached. Pl. Br. at 10.

In considering such a claim,[6] we note that "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler*, 467 U.S. at 60. Even had plaintiffs' reliance on IRS misconduct resulted in sufficient detriment to have invoked estoppel against a private party, none of the bad acts alleged here would create the "extreme circumstances" necessary to

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tional deficiencies are determined . . . . " Def. Appendix B at 31 (IRS Form 890-AD).

[5]Even if plaintiffs had actually lost their right to sue in Tax Court, any such detriment would be of little or no weight in deciding whether the government was estopped because the plaintiffs could still sue here and in the district courts. *Boulez*, 76 T.C. at 215-16.

[6]The claim of affirmative government misconduct, while central to plaintiffs' estoppel argument, is also connected to Counts IV and V of plaintiffs' complaint maintaining that the IRS improperly discriminated against plaintiffs. Therefore, our discussion in parts III C and D of this opinion is also relevant to our consideration of Counts IV and V.

support an estoppel claim against the government. *Richmond*, 496 U.S. at 434.

Plaintiffs claim to have "documented a cauldron of deceit and document destruction by IRS officials which violates IRS policies" and therefore estops the government from denying that a binding agreement was reached. Pl. Br. at 2 n.1. Plaintiffs' "cauldron" of allegations contains the following: 1) the improper destruction of the Form 890-AD; 2) the lie told by an IRS officer when he informed estate representatives that the closing letter was in the mail; 3) the IRS's violation of the requirements of Treas. Reg. (26 C.F.R.) § 301-7122-1(d) (4) (1967) (hereafter Section (d) (4)) that a) the proponent of a compromise be promptly notified in writing when the offer is rejected and that b) any payment accompanying a rejected offer be returned rather than cashed and credited to the taxpayer's account; 4) the unconscionable delay in processing the compromise offer; and 5) the alleged fact that the IRS appeals officer's actions in this case were guided by his attempt to get his daughter a job at the law firm representing the Major estate.

This last accusation will be dealt with separately, but taking plaintiffs' four other allegations of an IRS "cauldron of deceit" one at a time, we note: 1) as discussed above, the destruction of the Form 890-AD is immaterial; 2) oral information from the government, such as Hershkowitz's telephone comment that the closing letter was in the mail, cannot usually form the basis for a reliance claim, *Heckler*, 467 U.S. at 65, nor does this misrepresentation in any case constitute the affirmative government misconduct required for estoppel; 3) the IRS's failure to promptly notify plaintiffs of the rejection of their offer and failure to return the amount tendered with the settlement offer are both plain violations of Sec-

tion (d) (4), but even together they do not add up to the extreme circumstances required under *Richmond*, in part because no serious injury to plaintiffs resulted; *see Bowling v. United States*, 510 F.2d 112 (5th Cir. 1975) (holding that cashing tax checks does not produce a binding compromise); *Hughson v. United States*, 59 F.2d 17 (9th Cir.), *cert. denied*, 287 U.S. 630 (1932) (same); and 4) a three-month delay in processing an offer for compromise of tax liability is unfortunate, but is neither unusual in dealing with the IRS nor evidence of affirmative misconduct; *Avers v. Commissioner*, 55 T.C.M. (CCH) 678, 694 (1988) (stating that delay in processing settlement is unfortunate, but not an abuse of discretion). Suffice it to say that even when we assume the truth of all the contents of plaintiffs' "cauldron," there is no genuine issue which would require the denial of summary judgment for defendant in this case.

D

Plaintiffs' fifth allegation, the accusation that the IRS actively blocked the compromise agreement in an effort to coerce plaintiffs' lawyers into hiring an IRS officer's daughter, is worthy of separate discussion because of its seriousness. It is the only one of plaintiffs' allegations that possibly could rise to the level of the "extreme circumstances" needed to estop the government. *Richmond*, 496 U.S. at 434.

Here, however, plaintiffs have failed to show that this accusation presents a genuine issue precluding summary judgment. Once the party moving under RCFC 56 has established a preliminary case for summary judgment, as it has here by pointing to evidence seeming to show that no IRS coercion took place, Def. Appendix C, Exs. 2 and 3 (Affs. of Feigert and Blattmachr); *Id.* Ex. 5 (Letter

from Blattmachr to Hershkowitz), the burden shifts to the opposing party to "set forth specific facts showing that there is a genuine issue . . ." RCFC 56(f). "[T]he party opposing the summary judgment motion does not have the right to withhold his evidence until trial . . . ." 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2739, at 521 (1983). This is especially true when the facts which might tend to show a genuine issue are readily available to the party opposing summary judgment.

Here, plaintiffs have not substantiated their charge of improper influence with even a shred of evidence. On the contrary, plaintiffs' own affidavits show that the attorneys representing the estate were never contacted by the IRS regarding a job after their initial agreement to forward a resume to the firm hiring committee. Pl. Appendix, Exs. A and B (Affs. of Feigert and Blattmachr). In this case the affidavit filed by plaintiffs pursuant to RCFC 56(g), purporting to show why they should not now be expected to present evidence of a genuine issue, is unconvincing. Pl. Appendix, Ex. E. There is no need to deny summary judgment or allow additional discovery in order for plaintiffs to investigate how their own lawyers were influenced.

IV

The plaintiffs, in Counts IV and V of the complaint (Cplt. at 14, 17), maintain that because another Haffner bond estate which submitted its Form 890-AD later than plaintiffs received the same 60 percent inclusion compromise which plaintiffs had sought, the IRS failed in its duty to treat similarly situated taxpayers consistently. However, defendant has pointed to evidence that plaintiffs were not singled out for discriminatory treatment,

and that indeed many IRS regional offices were not at the time compromising any Haffner bond cases. Def. Appendix C, Ex. 8 (Internal Mem. of Pl. Law Firm); Pl. Appendix, Ex. 10 (IRS Mem.). Plaintiffs fail to show a genuine issue on this point, and their affidavit filed pursuant to RCFC 56(g) purporting to show why they should not now be expected to show such an issue is utterly unconvincing. Pl. Appendix, Ex. E.

A duty of administrative consistency certainly exists; the tax laws must be interpreted and applied as uniformly as possible.[7] As with the interpretation and application of tax laws, a duty of administrative consistency is also owed in the realm of tax compromises. However, there exists a fundamental difference between the type of discretion Congress grants the IRS to interpret or apply tax laws and the type of discretion granted to compromise tax cases. For clarity, we will refer to the first type of administrative discretion as *interpretive discretion* and to the second type as *settlement discretion.*

In exercising its interpretive discretion, the IRS might have the discretion to decide whether or not an

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[7] *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1918) (holding that county must use the same method of property assessment for all similar owners); *Baker v. Commissioner*, 787 F.2d 637, 640 (D.C. Cir. 1986) (noting IRS conceded that "camp exclusion" for living in a hardship area cannot be denied to taxpayer while being accorded to his fellow employees); *Sirbo Holdings, Inc. v. Commissioner*, 476 F.2d 981, 987 (2d Cir. 1973) (holding that IRS cannot concede capital gains treatment to one taxpayer and deny it to another who received an identical payment); *International Business Machines Corp. v. United States*, 170 Ct. Cl. 357, 373-74, 343 F.2d 914, 924 (1965) (stating that similar manufacturers must be given the same excise tax treatment for any given tax period), *cert. denied sub nom. United States v. International Business Machines Corp.*, 382 U.S. 1028 (1966); *Exchange Parts Co. v. United States*, 150 Ct. Cl. 539, 543, 279 F.2d 251, 254 (1960) (same).

item is taxable, but once that decision is made, it must be applied equally to all taxpayers. *International Business Machines Corp. v. United States*, 170 Ct. Cl. 357, 343 F.2d 914 (1965), *cert. denied sub nom. United States v. International Business Machines Corp.*, 382 U.S. 1028 (1966) (hereafter *IBM*). Settlement discretion, on the other hand, is at its heart a discretion to treat similarly situated taxpayers differently. Settlement discretion, unlike interpretive discretion, includes discretion to weigh the cases of similarly situated taxpayers individually. It is easy to imagine, for instance, that the IRS or one of its regional offices might for administrative or strategic reasons want to settle small cases differently from legally identical cases with larger amounts at stake. Accordingly, there is not even an obligation on the part of the IRS to treat co-investors in the same venture equally for settlement purposes. *Avers*, 55 T.C.M. (CCH) at 693-94.

Thus while taxpayers have a legal right to uniform interpretation of the laws, citizens who seek to compromise their tax liability have no legal right to a settlement. *Avers*, 55 T.C.M. (CCH) at 693 (stating that IRS settlement offers are "not dictated by law"). This does not mean taxpayers seeking to compromise disputed cases are at the full mercy of the IRS. While there may be no right to a settlement of one's tax liability, there is a right not to be discriminated against in seeking a settlement with the IRS.

Though no appellate court has ruled on the matter and this appears to be the Court of Federal Claims' first settlement discretion case, a number of Tax Court cases which we discuss below have held that the IRS in seeking compromise is limited by the strictures of the equal protection doctrine. This means that in the Tax Court, any

IRS selectivity in settlement is subject to a duty of fairness stemming from taxpayers' rights under the due process clause of the Fifth Amendment, which was in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), linked to the concept of equal protection.

In the first of its line of settlement discretion cases, *Penn-Field Industries, Inc. v. Commissioner*, 74 T.C. 720 (1980), the Tax Court, relying on due process precedent in criminal cases, held that to prevail on an allegation of improper IRS selectivity in audits, settlements, and litigation, the taxpayer:

> [M]ust meet *both* requirements of a two-pronged standard. It must *first* demonstrate that, while others similarly situated have not generally been selected . . . it has been singled out [for adverse treatment], and *second*, that the Commissioner's discriminatory selection of it has been based upon impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights.

Id. at 723.

Other Tax Court cases defining the Commissioner's duty of fairness in settling with similarly situated taxpayers have followed the *Penn-Field* analysis requiring proof of discrimination. *Fresoli v. Commissioner*, 55 T.C.M. (CCH) 1624, 1626 (1988) (holding that disparate treatment will not breach the duty of consistency if no discrimination was shown); *Avers*, 55 T.C.M. (CCH) at 692-94 (same). *See also Jaggard v. Commissioner*, 76 T.C. 222, 226-28 (1981) (discussing general duty of consistency without reference to settlement cases but deciding case on other grounds); *Davis v. Commissioner*, 65 T.C. 1014, 1022-23 (1976) (same).

These Tax Court cases indicate that in settling tax cases, the IRS breaches its discretionary standard not only when a suspect equal protection classification such as race or religion is used to differentiate between taxpayers, but also when any irrational or arbitrary classification is used.[8]

This is strongly reminiscent of the analysis in IRS abuse of interpretive discretion cases, which holds that the necessity for a " 'rational basis' " in distinguishing between similarly situated taxpayers is "central to the administration" of tax laws providing interpretive discretion to the IRS. *IBM*, 343 F.2d at 920 (quoting *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring)).

In both the Tax Court's discriminatory settlement cases and the more usual abuse of interpretive discretion cases, the evil sought to be mitigated is discriminatory treatment of similarly situated taxpayers. *Compare Avers*, 55 T.C.M. (CCH) at 693 (requiring "discriminatory selection" before relief can be granted) *and Fresoli*, 55 T.C.M. (CCH) at 1626 (stating that plaintiffs must show "invidious discrimination" to prevail) *and Penn-Field*, 74 T.C. at 723 (same) *with Sirbo Holdings Inc. v. Commissioner*,

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[8] *Fresoli*, 55 T.C.M. (CCH) at 1626 (implying that "arbitrary classification," like constitutionally impermissible considerations, can create improper discrimination); *Avers*, 55 T.C.M. (CCH) at 694 (noting that a " 'rational reason for the disparate treatment must exist' " to avoid invalid discrimination) (quoting *Johnson v. Smith*, 696 F.2d 1334, 1337 (11th Cir. 1984)); *Id.* (implying that "abuse of discretion" can create improper discrimination); *Id.* (stating that showing an "arbitrary classification" and that taxpayers were "intentionally treated differently" would create improper discrimination); *Penn-Field*, 74 T.C. at 723 (stating that "unjustifiable standard[s include] race, religion, *or other arbitrary classification*") (emphasis added).

476 F.2d 981, 987 (2d Cir. 1973) (*Sirbo I*) (stating that taxpayers are "entitled to a non-discriminatory administration of the tax laws") *and IBM*, 343 F.2d at 923 (finding "unjustifiable discrimination" and granting relief to taxpayer) *and Exchange Parts Co. v. United States*, 150 Ct. Cl. 539, 543, 279 F.2d 251, 254 (stating that taxpayer cannot be "made the object of prejudicial discrimination").

The interpretive discretion cases are often couched in the language of equal protection. *Sirbo Holdings, Inc. v. Commissioner*, 509 F.2d 1220, 1222 (2d Cir. 1975) (*Sirbo II*) (stating that "even-handed treatment should be the Commissioner's goal"); *IBM*, 343 F.2d at 920 (citing "[e]quality of treatment" as the goal); *Id.* at 923 (noting that "fairness called upon the Commissioner . . . to establish a greater measure of equality").

For these reasons, we recognize the Tax Court's approach to the settlement discretion problem as persuasive, fair and in concert with leading Court of Claims cases on abuse of administrative discretion such as *IBM* and *Exchange Parts*. Therefore, to prevail on its abuse of settlement discretion claims, the plaintiffs must show both 1) that other similarly situated taxpayers have received more favorable settlements *and* 2) that the IRS intentionally singled out plaintiffs for arbitrary or irrational reasons.

Bearing these legal elements of plaintiffs' abuse of discretion claim in mind, we find that the defendant has pointed to evidence that plaintiffs were not singled out, and rather that many similarly situated taxpayers across the country were not able to compromise Haffner bond cases. Def. Appendix C, Ex. 8; Pl. Appendix, Ex. 10. Even though the majority of Haffner bond cases handled by the New York City Appeals Office during the period

in question were settled, defendant has made an initial showing that the IRS did not intentionally discriminate against the Major estate, but rather followed its usual neutral procedures. Def. Appendix B at 25-27 (Aff. and Mem. of Brancato). The plaintiffs have failed to bring forth any evidence that might establish a genuine issue on this point, and have failed to show good reason why they should not now be expected to demonstrate a genuine issue. There is no reason to deny summary judgment on Counts IV and V.

V

It remains intuitively troubling that after the nationally circulated IRS memorandum of April 28, 1987 purporting to end all Haffner bond settlements the agency in fact did settle such a case on terms identical to those sought here by plaintiffs.[9] But this concern does not survive scrutiny in any way that benefits plaintiffs.

As discussed above, the discretion vested in the IRS to settle tax cases is by its very nature a discretion to treat similarly situated taxpayers differently. Within the constraints imposed by regulation and the equal protection or abuse of discretion doctrine, the authority of the IRS to compromise cases of disputed liability has long been absolute. The "power to compromise clearly authorizes the settlement of *any case* about which uncertainty exists as to liability or collection." Op. A. G. 7, 13-2 C.B. 445, 446 (1934) (emphasis added).

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[9]Unlike a Treasury Regulation, an internal IRS policy does not bind the IRS. *Boulez v. Commissioner*, 810 F.2d 209, 214-16 (D.C. Cir), *cert. denied*, 484 U.S. 896 (1987). Thus, to the extent plaintiffs believe the April 28, 1987 memorandum binds the IRS, they are mistaken.

This permissive rule is still in effect, as reflected in the regulation which authorizes tax case settlements: "*Any* such liability *may* be compromised . . . ." Treas. Reg. (26 C.F.R.) § 301-7122-1(a) (1967) (emphasis added). Therefore the only judicial inquiry in evaluating the propriety of an IRS refusal to settle is whether or not the taxpayer has been improperly discriminated against. It does not avail the claimant to point to others who have received more favorable treatment. The IRS may compromise with a taxpayer, but is not thereby required to offer the same—or even any—deal to other taxpayers. When settlement is at issue, as long as there has been no abuse of discretion or other invalid discrimination:

> [P]etitioners cannot avoid tax liability by showing that others have been treated generously, leniently or erroneously by [the IRS]; rather, each petitioner must rest on the validity of his own position under the applicable taxing provisions, independently of others.

Avers, 55 T.C.M. (CCH) at 694 (citing *IBM*, 343 F.2d at 919); *see also Davis*, 65 T.C. at 1022 (stating that "how the Commissioner may have treated other taxpayers has generally been considered irrelevant" in determining tax liability); *Baker v. Commissioner*, 787 F.2d 637, 644 (D.C. Cir. 1986) (noting in a fee award case that each IRS office has leeway to decide whether to settle and that different IRS agents cannot "be expected to march in lock step").

While the analysis in abuse of interpretive discretion cases starts from the premise that all similarly situated taxpayers are entitled to identical treatment, the analysis in abuse of settlement discretion cases starts from premise that differential treatment is valid if there is no improper discrimination. If simply showing that the IRS

settled with another similarly situated taxpayer were enough to prove discrimination, the IRS would be stripped of any real discretion to settle: the compromise of one case would mean all similarly situated taxpayers were legally entitled to the same settlement. Here, the defendant has made an initial case that IRS procedures were neutrally followed. Def. Appendix B at 25-27 (Aff. and Mem. of Brancato). Plaintiffs' evidence that another taxpayer was granted a settlement even after the IRS declared a non-binding internal policy of not settling Haffner bond cases does not by itself show the potential to prove at trial an IRS intent to discriminate against plaintiffs. Plaintiffs have shown no such potential.

VI

For the foregoing reasons, defendant's summary judgment motion filed December 9, 1992 is GRANTED. Accordingly, judgment shall be entered in favor of defendant.

Pursuant to RCFC 54(d), costs shall be allowed to the defendant ("the prevailing party").

/s/ James T. Turner
James T. Turner
Judge

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 92-399 T

[Filed JUN 10 1993]

HAZEL W. BUNCE AND THE BANK OF
NEW YORK, EXECUTORS FOR THE ESTATE
OF CHARLOTTE B. MAJOR,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's opinion and order of June 9, 1993, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Costs to defendant.

David A. Lampen
Clerk of Court

By: [Illegible]
Deputy Clerk

June 10, 1993

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs.* Filing fee is $105.00.

APPENDIX C

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on June 20, 1994.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: June 13, 1994

By: /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: SAMUEL M. MARUCA
GARY R. ALLEN

BUNCE V US, 93-5178
(CFC – 92-399T)

[Filed JUN 13 1994]

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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APPENDIX D

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by inter-

rogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits, Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order

a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 92-399 T

(Judge James T. Turner)

ESTATE OF CHARLOTTE B. MAJOR

Plaintiff

v.

THE UNITED STATES,

Defendant

AFFIDAVIT OF DAVID H. DICKIESON
PURSUANT TO RULE 56(g)

District of Columbia §
Washington §

I, David H. Dickieson, am the attorney of record for the Plaintiff in the above-captioned case, and I state as follows:

1. The Plaintiff is unable to provide affidavits or sworn testimony in opposition to certain facts alleged in the United States' Motion for Summary Judgment for the following reasons:

a. The United States has failed and refused to provide a witness knowledgeable about certain issues, despite a notice of deposition pursuant to Rule 30(b)(6).

b. The United States has failed and refused to respond to any interrogatory requests, but instead sought an interim suspension of discovery until the motion for summary judgment was decided.

c. The United States refused to produce documents and redacted other documents responsive to certain of Plaintiff's discovery requests.

d. The United States failed to provide information concerning the whereabouts of a key witness, Leonard Hershkowitz, until after it had obtained an order staying all discovery. Then it provided an address and phone number which no one has yet answered.

e. The United States' attorney during the deposition of Associate Chief of Appeals Benjamin A. Brancato, directed the witness not to answer 24 key questions addressing the merits of this case. Further questioning on these key issues was thereby aborted.

2. This case concerns actions taken by the Internal Revenue Service in settling a case consistent with IRS policies.

3. The United States is the sole custodian of certain key information concerning whether the case was settled and/or whether the IRS has followed proper procedures in the settlement process.

4. The United States is the sole custodian of certain key information with respect to whether the IRS is estopped from denying the existence of a settlement.

5. Discovery to date has revealed that the Internal Revenue Service has improperly destroyed settlement documents and that a subsequent internal review of the IRS action, improperly sought to cover up the IRS's improper actions.

6. In the absence of further discovery, the Plaintiff's rights will be prejudiced and the improprieties of the IRS will not be fully investigated and disclosed.

7. Further discovery is necessary to rebut the incomplete factual allegations asserted by the United States in its Motion for Summary Judgment.

8. The United States has included in its supporting documents the hearsay statement of former appeals officer, Leonard Hershkowitz. Mr. Hershkowitz's statement is not a sworn statement and is grossly incomplete and therefore misleading. Mr. Hershkowitz's deposition is necessary before this summary judgment motion can be determined.

9. Apart from the affidavit of the Department of Justice attorney, Robert A. Higgins, the United States has presented only one affidavit – the affidavit of Benjamin A. Brancato, Associate Chief of Appeals, in the New York City Appeals office of the IRS. Mr. Brancato admitted, however, during his deposition that he has "no personal knowledge of anything that happened prior to [his] receiving this [Major] file on July 27, [1987]." Dep. of Brancato at p.94. Additional discovery is necessary to obtain deposition testimony, documents and other information from those IRS employees who do have personal knowledge of the facts during the relevant time period of February through June, 1987.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 25th day of January, 1993

/s/ David H. Dickieson
David H. Dickieson